

Ang Sue Khoon v Majlis Bandaraya Pulau Pinang

PLANNING APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/5 OF 2015
YEO YANG POH CH, TAN CHONG MENG AND MALKIT SINGH
28 DECEMBER 2015

Local Government — Town and Country Planning — Planning permission — Stay of implementation or execution of planning permission — Application for — Whether stay should be granted — Whether there were special circumstances that were sufficient to tilt scale of justice in favour of appellant — Whether two contradicting orders issued by respondent in respect of land constituted special circumstances — Whether appellant had legitimate expectation that respondent would not reverse earlier rebuild order — Whether creation of third parties' interest in proposed project would constitute special circumstances — Whether undertaking in damages should be imposed on appellant

The respondent had granted Klassik Tropika Development Sdn Bhd ('the applicant') planning permission to develop a piece of land situated in Bandar George Town, Pulau Pinang ('the land') by constructing two blocks of luxurious condominiums on the land ('the Bandar George Town, Pulau Pinang proposed project'). Ang Sue Khoon ('the appellant') and several owners of other neighbouring plots of lands had objected to the applicant's application for planning permission. Upon being notified that the applicant had obtained planning permission, the appellant and some nine other owners of neighbouring lands had filed an appeal to the Planning Appeal Board. After filing her appeal, the appellant filed the present application for a stay of the implementation or execution of the planning permission granted by the respondent to the applicant on the grounds that if the planning permission was not stayed, the applicant would have progressed to a substantial stage of the proposed project by the time of the hearing of her appeal. The applicant responded that the appellant's concerns were misplaced because any works that were to be carried out on the proposed project could be easily demolished if the planning permission was later set aside. The appellant submitted that there were special circumstances in the present case that would be sufficient to tilt the scale of justice in her favour. The appellant relied on the development history of the land to support her case on special circumstances. It was an undisputed fact that the land had a double storey detached house ('the old building'), which the applicant had demolished without obtaining the requisite planning permission. The applicant had been charged for this unlawful act and fined a sum of RM6,000. In addition, the respondent had issued an order requiring the applicant to reinstate the old building on the land ('the rebuild order').

- A Without complying with the rebuild order the applicant had proceeded to submit an application for planning permission for the proposed project. The appellant argued that these contradicting orders namely the rebuild order followed by the grant of planning permission for the proposed project would constitute special circumstances. However, the respondent argued that the
- B rebuild order was wrongly issued because it sought to charge the applicant for an offence it had already been fined the sum of RM6,000.

Held, granting the stay pending the final disposal of the appeal before the board with each party bearing its own costs of this application:

- C (1) A planning permission could not be described as a judgment. Although, a stay of implementation of a planning permission would share some similarities with the stay of execution of a court judgment in that both would prevent a party from immediately reaping the fruit of his success,
- D the fact that Parliament had provided a statutory route of appeal from the local planning authority to the Appeal Board would mean that this process of appeal was a part of the scheme designed by the Act for the consideration of a planning application. However, having said that it was also clear that an appeal from the local authority to the Appeal Board did
- E not operate as a stay. Further, the appellant had the right to apply for a stay of implementation or execution of a planning permission under s 36(1)(g) of the Town and Country Planning Act 1976 and r 17 of the Appeal Board Rules 1989 (see paras 19–21, 39 & 43–48).
- F (2) The decision as to whether to grant or refuse a stay was a matter of discretion, which should be exercised judiciously and in accordance with established principles. Principally, a stay could be granted if there were special circumstances sufficient to tilt the scale of justice in favour of the stay applicant. In the present case, the respondent had at first issued a
- G rebuild order, which order was still subsisting, and then granted the applicant planning permission for the construction of condominiums on the land. These contradictory actions on the part of the respondent would give birth to special circumstances, with legal implications. In such circumstances, an interested party such as the appellant had prima
- H facie a legitimate expectation that the respondent would not reverse its earlier decision ie the rebuild order without very sound reasons. The sum total of the unusual circumstances in this case were more than sufficient to constitute special circumstances that would be necessary for the granting of a stay in this action (see paras 22, 25, 29–30, 48 & 53–59).
- I (3) In addition, allowing the planning applicant to proceed with development works, and by so doing alter the status quo, was also likely to create third parties' interest. This was another set of special circumstances that existed in the present context (see paras 77–78).

- (4) Both r 17 of the Rules and s 36(10)(g) of the Act allow for the imposition of an undertaking in damages on the appellant. However, the present case was not one where it would be right, fair or appropriate to require the appellant to give an undertaking in damages (see paras 96–98).

[Bahasa Malaysia summary]

Responden telah memberikan Klassik Tropika Development Sdn Bhd ('pemohon') kebenaran perancangan untuk membangunkan sebidang tanah yang terletak di Bandar George Town, Pulau Pinang ('tanah tersebut') dengan membina dua blok kondominium mewah atas tanah tersebut ('cadangan projek Bandar George Town, Pulau Pinang'). Ang Sue Khoon ('perayu') dan beberapa pemilik plot tanah bersebelahan telah membantah permohonan pemohon untuk kebenaran perancangan itu. Setelah diberitahu bahawa pemohon telah memperoleh kebenaran perancangan, perayu dan sembilan pemilik tanah bersebelahan yang lain telah memfailkan rayuan kepada Lembaga Rayuan Perancangan. Selepas memfailkan rayuannya, perayu telah memfailkan permohonan ini untuk penggantungan pelaksanaan atau penyempurnaan kebenaran perancangan yang diberikan oleh responden kepada pemohon atas alasan bahawa jika kebenaran perancangan itu tidak digantung, pemohon mungkin telah melaksanakan ke satu peringkat yang substantial untuk projek yang dicadangkan itu pada masa rayuannya didengar. Pemohon telah menjawab bahawa kebimbangan perayu tidak berasas kerana apa-apa kerja yang perlu dijalankan untuk projek yang dicadangkan itu dengan mudah dapat dirobuhkan jika kebenaran perancangan diketepikan kemudian. Pemohon berhujah bahawa terdapat keadaan tertentu dalam kes ini yang mencukupi untuk mendapat keadilan menyebelainya. Perayu bergantung kepada sejarah pembangunan tanah tersebut untuk menyokong kesnya dalam keadaan tertentu. Ia suatu fakta yang tidak dipertikaikan bahawa tanah tersebut mempunyai rumah berkembar dua tingkat ('bangunan lama'), yang mana telah dirobuhkan oleh pemohon tanpa memperoleh kebenaran perancangan yang diperlukan. Pemohon telah dituduh kerana perbuatan yang menyalahi undang-undang ini dan telah didenda sejumlah RM6,000. Tambahan, responden telah mengeluarkan satu perintah yang menghendaki pemohon membina semula bangunan lama itu di atas tanah tersebut ('perintah pembinaan semula'). Tanpa mematuhi perintah pembinaan semula itu pemohon telah terus mengemukakan permohonan untuk kebenaran perancangan bagi projek yang dicadangkan. Perayu berhujah bahawa perintah-perintah yang bercanggah tersebut iaitu perintah pembinaan semula diikuti dengan pemberian kebenaran perancangan bagi projek yang dicadangkan merupakan keadaan tertentu. Walau bagaimanapun, responden berhujah bahawa perintah pembinaan semula itu telah salah dikeluarkan kerana ia memohon untuk mendakwa pemohon bagi kesalahan yang mana ia telahpun didenda sejumlah RM6,000.

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- A **Diputuskan**, memberikan penggantungan sementara menunggu keputusan akhir rayuan di hadapan Lembaga dan setiap pihak menanggung kosnya sendiri untuk permohonan ini:
- (1) Satu kebenaran perancangan tidak boleh dianggap satu penghakiman. Walaupun, satu penggantungan pelaksanaan kebenaran perancangan akan memiliki persamaan dengan penggantungan pelaksanaan penghakiman mahkamah di mana kedua-duanya akan menghalang satu pihak untuk dengan segera mendapat keuntungan daripada kejayaannya, fakta bahawa Parlimen telah memperuntukkan rayuan secara statutori daripada pihak berkuasa perancangan tempatan kepada Lembaga Rayuan bermaksud proses rayuan ini adalah sebahagian daripada skim yang direka oleh Akta untuk pertimbangan permohonan perancangan. Walau bagaimanapun, jikapun begitu ia juga jelas bahawa rayuan daripada pihak berkuasa tempatan kepada Lembaga Rayuan tidak berfungsi sebagai satu penggantungan. Selanjutnya, perayu mempunyai hak untuk memohon penggantungan bagi pelaksanaan atau penyempurnaan kebenaran perancangan di bawah s 36(1)(g) Akta Perancangan Bandar dan Negeri 1976 dan Kaedah 17 Kaedah-Kaedah Lembaga Rayuan 1989 (lihat perenggan 19–21, 39 & 43–48).
- (2) Keputusan sama ada untuk memberi atau menolak penggantungan adalah perkara berhubung budi bicara, yang sepatutnya dilaksanakan secara bijaksana dan menurut prinsip-prinsip yang ditetapkan. Secara prinsip, satu penggantungan boleh diberikan jika terdapat keadaan tertentu yang mencukupi untuk menyebabkan keadilan menyebelahi penggantungan pemohon. Dalam kes ini, responden pada mulanya telah mengeluarkan perintah pembinaan semula, yang mana perintah itu masih wujud, dan kemudian memberikan pemohon kebenaran perancangan untuk pembinaan kondominium atas tanah tersebut. Tindakan bercanggah ini di pihak responden akan membawa kepada keadaan tertentu, dengan kesan perundangan. Dalam keadaan sedemikian, pihak yang berkepentingan seperti perayu mempunyai jangkaan sah secara prima facie yang mana responden tidak boleh mengakaskan keputusannya yang terdahulu iaitu perintah pembinaan semula tanpa sebab yang kukuh. Jumlah keseluruhan keadaan luar biasa dalam kes ini lebih daripada mencukupi untuk merupakan keadaan tertentu yang perlu untuk memberikan satu penggantungan dalam tindakan ini (lihat perenggan 22, 25, 29–30, 48 & 53–59).
- (3) Tambahan pula, dengan membenarkan perancangan pemohon untuk meneruskan dengan kerja pembangunan, dan dengan berbuat demikian mengubah status quo, juga berkemungkinan mewujudkan kepentingan pihak ketiga. Ini merupakan satu set keadaan tertentu lain yang wujud dalam konteks ini (lihat perenggan 77–78).

- (4) Kedua-dua kaedah 17 Kaedah tersebut dan s 36(1)(g) Akta tersebut membenarkan untuk pengenaan satu aku janji untuk ganti rugi ke atas perayu. Walau bagaimanapun, kes ini bukan satu di mana ianya betul, adil atau sesuai untuk menghendaki perayu memberi aku janji untuk ganti rugi (lihat perenggan 96–98).]

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Cases referred to

- Allen and others v Jambo Holdings Ltd and others* [1980] 2 All ER 502, CA (refd)
- Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695, CA (refd)
- Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17, CA (refd)
- Eshwara Engineering Sdn Bhd v Delta Structure Sdn Bhd* [2003] 4 MLJ 18, HC (refd)
- Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503, HL (refd)
- Federal Commissioner of Taxation v Myer Emporium Ltd* (1986) 64 ALR 325, HC (refd)
- Hong Leong Finance Bhd v Hon Hoi Weng* [1987] 2 MLJ 377 (folld)
- Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493, HC (refd)
- Kontiki Trading Pte Ltd v Protama Sdn Bhd & Ors* [1998] MLJU 415, HC (refd)
- Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257, FC (refd)
- Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 (refd)
- Petronas Dagangan Sdn Bhd v Omar bin Abdul Samad* [1996] 4 MLJ 391, HC (refd)
- R (on the application of Chisnell) and another v London Borough of Richmond Upon Thames and another* [2005] EWHC 134, QBD (refd)
- Regina v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 QB 558, CA (refd)
- Seema Development Sdn Bhd v Mah Kim Chye* [1997] MLJU 235; [1998] 1 CLJ 174, HC (refd)
- Siglin v Choules* [2001] WASCA 308, SC (refd)
- South Bucks District Council v Porter and another* [2003] UKHL 26, HL (refd)
- Splended Wave Sdn Bhd v Song Hua Sub* [2015] 8 MLJ 612, HC (refd)
- Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 3)* [2006] 5 MLJ 372; [2006] 6 CLJ 654, HC (refd)
- YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja' Afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128, HC (refd)

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Legislation referred to

Appeal Board Rules 1989 r 17

- A Town and Country Planning Act 1976 ss 19(1), 21, 27(2)(a), (9), 36(10)(g)
Ong Yu Shin (GT Lee with him) (Yu Shin Ong) for the appellant.
Shamiah (Pengarah Undang-Undang, Majlis Bandaraya Pulau Pinang) for the respondent.
- B *Adrian Choong (Reza Rahim with him) (LH AG) for the planning applicant,*
Klassik Tropika Development Sdn Bhd.

Yeo Yang Poh Ch:

C ON STAY OF IMPLEMENTATION OF PLANNING PERMISSION

- D [1] Klassik Tropika Development Sdn Bhd ('the planning applicant') is the owner of the land held under Lot 951, Sek 13, Bandar George Town, Daerah Timur Laut, Pulau Pinang ('the subject land'). The planning applicant is a subsidiary of Mah Sing Group Bhd. On or about 11 November 2014, the respondent granted the planning applicant a planning permission to develop the subject land ('the planning permission'), subject to several conditions. The project approved by the respondent ('the proposed project') will comprise the following:
- E (a) a block of 30-storey luxurious condominiums (inclusive of five storeys of car park, and one storey of community facilities); and
- F (b) another block of 24-storey luxurious condominiums (inclusive of five storeys of car park, and one storey of community facilities).
- G [2] The appellant is the owner of Lot 855, Sek 13, DTL, Bandar George Town (bearing the postal address of No 7, Lorong Pykett, 10400 Pulau Pinang), a 'neighbouring land' as defined under s 21 of the Town and Country Planning Act 1976 ('the Act'). She and several owners of other neighbouring lands had objected to the planning applicant's application. Upon being notified that the said planning application was successful, she filed her present appeal to this board. Some owners of other neighbouring lands did likewise. There were, at the start, nine similar appeals to this board regarding the proposed project.
- H The planning applicant is not a party named in any of these appeals. Nevertheless, the outcome of these appeals (including any interlocutory applications) will intimately affect their interest. As such, this board has, as a matter of course, given them full opportunity to be heard in these matters, and will continue to do likewise in further proceedings under these appeals.
- I [3] After filing her appeal, the appellant filed an interlocutory application against the respondent, for the discovery and production of certain documents.

At the hearing of that application, the respondent readily agreed to produce most of the documents sought, save for a few which the respondent said it did not have in its possession. Those documents voluntarily produced by the respondent are now available not only to the appellant, but also to the other appellants in the connected cases.

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[4] On 17 April 2015, at the hearing of the application for discovery, the appellant had also sought to be informed as to whether the planning applicant had already been granted a 'commencement of work' permit. The planning applicant then said that it had yet to apply for the same; and that it would promptly inform the appellant if such an application was made.

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[5] Shortly after the hearing, however, the planning applicant's solicitors wrote a letter to the board (and copied to the parties), saying that the information they had earlier provided was incorrect. They made the correction that the planning applicant had in fact already applied for a 'commencement of work' permit, and was waiting for its approval.

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[6] Upon hearing the same, the appellant filed another interlocutory application, for stay of the implementation of the planning permission granted to the planning applicant. The appellant's stay application is joined and supported by several (but not all) of the other appellants in the connected cases. The decision which will be delivered below, naturally, has a binding effect on the appellants in the other related appeals as well.

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[7] The appellant heavily criticised the planning applicant for lack of bona fide in giving the wrong information during the earlier hearing of the discovery application. I do not think such criticism is justified in the context, for I am satisfied that it was a case of a genuine mistake or miscommunication, which the planning applicant had quickly rectified upon realising its mistake. No adverse inference against the planning applicant is warranted, out of this episode.

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[8] After hearing arguments from learned counsels for the parties regarding the stay-application, a 'partial stay' was granted (which I shall later explain). Brief grounds were given *ex tempore*, when the decision was pronounced. I now provide the full grounds below.

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A. BACKGROUND

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[9] The subject land measures approximately 3.384 acres, located at Lebuhraya Pykett. It had a double storey detached house on it, bearing postal address No 20, Lebuhraya Pykett, 10400 Pulau Pinang ('the old building'), which was built decades ago. The old building was not classified or designated

- A as a 'heritage building'. Nevertheless, the appellant claims that it had considerable historical value, and was deserving of preservation. This is disputed by the planning applicant, who had described the old building as a *'dilapidated unoccupied small bungalow'* (see Mah Sing Group Bhd's announcement dated 2 December 2009), presumably of little or no historical value or interest.
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- [10] The subject land was formerly owned by Khaw Bian Cheng Sdn Bhd ('the previous owner'). The appellant says that the previous owner had applied for planning permission to demolish the old building. The appellant says that she knew about it because she was notified of the application, and she had objected to the same. That application was later rejected by the respondent — see paras 9(d) and (f) of exh 'A2' in the appellant's affidavit dated 20 May 2015. The planning applicant has not disputed these information, at this stage at least.
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[11] On second December 2009, the planning applicant contracted to buy the subject land from the previous owner, with the intention of developing it.

- E [12] On 3 August 2010, ie not long after the planning applicant became the owner of the subject land, events took a rare and unexpected turn. Without obtaining the requisite planning permission, the planning applicant demolished the old building. It is not disputed that such an act is unlawful. They were taken to task for it, and were charged in the magistrates' court, under s 19(1) of the Act. They pleaded guilty to the charge, and were fined a sum of RM6,000. The public prosecutor appealed to the High Court (against sentencing), but withdrew the appeal when it came up for hearing.
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- [13] Pursuant to s 27(2)(a) of the Act, the respondent also issued a notice dated 11 February 2011 to the planning applicant ('the rebuild order'), requiring the planning applicant to restore or reinstate the old building on the subject land. The planning applicant has not complied with the rebuild order, despite the effluxion of a few years. The respondent has offered no evidence that it has taken any step to either enforce or withdraw the rebuild order. These are matters to which I shall later return to discuss.
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- [14] While not complying with the rebuild order, the planning applicant on the other hand proceeded to submit an application for planning permission ('the planning application') for the proposed project. The planning application was made on or about 24 June 2013, ie more than 28 months after the planning applicant had been required by the rebuild order dated 11 February 2011 to restore the old building. In the planning application, the planning applicant seeks (among other things) to have the benefit of an increased density of 87 units per acre, when the original permissible density for the subject land (and
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for the surrounding lands) is 30 units per acre only. It seeks to do so by relying on the 'Garis Panduan Peningkatan Ketumpatan dan Nisbah Plot di Majlis Perbandaran Pulau Pinang' ('the increased density guidelines') which came into effect on 28 June 2010 (with subsequent amendments).

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The respondent, *inter alia*, accepted the applicability of the increased density guidelines to the proposed project, and granted the planning permission (subject to conditions).

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[15] Before the board, the appellant contends that the increased density guidelines are in fact inapplicable to the subject land, and that both the respondent and the planning applicant have misconstrued the same. This will no doubt be one of the main issues to be determined in the hearing of the appeal in due course.

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[16] Presently, the appellant is applying for a stay of the implementation or execution of the planning permission granted by the respondent to the planning applicant. She fears that, if the planning permission is not 'stayed', construction will soon start, and the status quo in the area in which she lives could be disturbed to an extent that would be difficult or impossible to restore.

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The appellant is also concerned that works could have progressed to a substantial or advanced stage by the time the hearing of her appeal is completed and a decision reached; and (more problematically) by which time a situation could arise where it might prove difficult, impractical, harsh or even unfair to the planning applicant to compel them to demolish what they shall have done, and to watch the huge sums of money that they shall have expended (tens of millions of Ringgit will not be an exaggeration) go up in smoke.

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[17] The planning applicant, on the other hand, asserts that the appellant's worry is misplaced; because any works that may already have been carried out or completed can be demolished if the planning permission is later set aside. Although such demolition will be costly and drastic, if construction shall have reached a substantial or advanced stage; the planning applicant declares that it will be prepared to do so, and to bear all the losses which will be incurred (no matter how large), if it should come to that. The planning applicant assures everybody that it has the financial means to bear such losses, it being a subsidiary of Mah Sing Group Bhd.

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[18] The respondent took a 'neutral' stand regarding the stay-application, viewing it as a 'contest' between the appellant and the planning applicant; content to remain largely at the side line.

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A B. THE LAW ON STAY OF IMPLEMENTATION OF A PLANNING PERMISSION

B.1 Stay of execution of a judgment — a case for analogy

B [19] The power of the board to grant a stay of implementation or execution of a planning permission is neither in doubt nor in dispute between the parties — reflecting awareness of s 36(10)(g) of the Act and r 17 of the Appeal Board Rules 1989. The issue in vigorous contention is whether the Board ought to do so in the circumstances of this case.

C [20] Parties have not submitted any case squarely on point regarding the principles of law applicable to the stay of implementation or execution of a planning permission. But there are of course a long line of cases on the stay of execution of a court judgment, on which both the appellant and the planning applicant appear content to rely. I, too, regard these authorities as a good starting point for us, without forsaking the need to then ascertain to what extent an appropriate analogy can be drawn from them, and to see if the principles in these cases can be either fully or partially adopted and applied here.

E [21] Similarity between a stay of a court judgment and a stay of a decision of an administrative or quasi-judicial decision maker has received indirect recognition in the courts. In *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 at p 723A–B; our Court of Appeal quoted passages by Glidewell LJ of the English Court of Appeal, in *Regina v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 QB 558 at pp 561–562 (also reported in [1991] 1 All ER 282 at p 285h, as follows:

G ... this question comes back to the issue whether the phrase ‘a stay of the proceedings’ is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is wide enough to embrace such decisions, it follows that what is sought is just as much a stay as it would be in relation to a decision or judgment of an inferior court.

H [22] The requirement of the existence of ‘special circumstances’, before a stay of execution of a judgment may be ordered, has been settled by our apex court in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; from which the following principles can be distilled:

I (a) an appeal does not operate as a stay. It is a matter of discretion whether

to grant or refuse a stay; which discretion must be exercised judiciously, having regard to the requirement of justice in each case;

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- (b) in normal circumstances, a successful litigant ought not to be deprived of an *immediate* harvest of the fruits of litigation;

- (c) however, where there exist ‘special circumstances’ in a case, a stay may quite properly be granted. The searching (and at times elusive) question is what could amount to ‘special circumstances’. The answer to this question must depend on the facts of each case;

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- (d) the fact that the outcome of a successful appeal might become nugatory if a stay is not granted (‘the nugatory factor’) is not a separate and distinct ground for the grant of a stay. Rather, it is a type of ‘special circumstances’, perhaps the most common one, which could in many instances justify a stay. In the words of the Federal Court:

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... there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, *special circumstances is the genus of which nugatoriness is a species.* (At para 18 of the judgment in *Kosma’s* case, emphasis supplied).

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- (e) merits of an appeal is not a ‘special circumstance’; and is in that sense irrelevant in a stay application (see para 19 of the judgment in *Kosma’s* case). I will, in paras 33–35 below, explain why I use the phrase ‘in that sense’ here.

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[23] The rationale for a strict demand for ‘special circumstances’ is easy to appreciate. On the one hand, a litigant who has expended considerable time and resources milling through a judicial system, pursuing (or counter-pursuing) a claim or relief in a court of law, and who emerges victorious at the end of a trial or hearing, ought not to lightly be deprived of his immediate entitlement to the fruits of his success. That is the general position. On the other hand, the full judicial process has not yet come to a close, if an appeal has been lodged to a higher court; and there are bound to be instances where a stay would be appropriate (or even essential), for good reasons — such as to preserve the subject matter or the integrity of the appeal, or to prevent injustice to any of the parties should the appeal succeed in time to come.

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[24] These two counteracting considerations define the arena of contest in a stay application. The task for a judge or an adjudicator is to strike as fair a balance between competing interests as the circumstances would allow. I will discuss this aspect further, in paras 36–38 below.

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A *B.2 Special circumstances — a term defying precise definition*

[25] In making a decision in a stay-application, the challenging task is to ascertain either the existence or the absence of any 'special circumstances' in a particular case, bearing in mind that the types of special circumstances are not closed:

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... there are myriad circumstances that could constitute special circumstances, with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. (per Justice Ian Chin in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514 at p 521H).

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[26] That pronouncement, however, is not a licence to freely add to the types of special circumstances, at the slightest inclination of a party, or a judge or adjudicator. The open ended nature of what could constitute special circumstances simply means that, *if justice so requires* in the circumstances of a particular case, and after weighing all relevant factors, one does not have to feel constrained by having to meet a rigid or exhaustive definition into which the facts of that case may not nicely fit.

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[27] The nugatory factor is the most frequently used argument in stay-applications. The apex court of Australia, in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1986) 64 ALR 325, explains it this way:

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... special circumstances ... exist where, for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed (at p 327).

In *Siglin v Choules* [2001] WASCA 308 (at para 3); the scope is widened a little:

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Special circumstances justifying a stay will exist if the appellant shows that, if a stay is not granted, the *appeal may be nugatory, or a serious injury will result to the appellant* ... The appeal must also have some prospects of success. (Emphasis added.)

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[28] But the nugatory factor is certainly not the only possible special circumstance that could warrant a stay. Short of defining 'special circumstances', courts have described the features they ought to have or include. The Federal Court in *Kosma's* case (at para 13 of the judgment) adopted the following dicta in *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ

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Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

In *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 3)* [2006] 5 MLJ 372 at p 376; [2006] 6 CLJ 654 at p 659, para 8, the following description was used:

What constitutes special circumstances is a question of fact in each individual case. A special circumstance must be something distinctive and out of the way.

[29] What is quite clear is that, at the risk of stating the obvious, special circumstances must be something *other than* what is ordinary, common or usual for cases of a similar nature to the one under scrutiny. In the absence of other compelling reasons, what is normal or common will usually not constitute special circumstances.

[30] In my view, whatever words of depiction that different judges may respectively prefer, at the end of the day it is (quite rightly so) about what the justice of a case requires. What 'special circumstances' must constitute is, in the final analysis, sufficient reason to tilt the scale of justice in favour of an applicant for stay. Anything short of that will not amount to 'special circumstances'. This view has support from the following dictum in *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493 at p 499G:

Special circumstances ... is a term to denote a combination of certain determining factors ... to persuade the court that it is a just and appropriate case to grant a stay of execution in the circumstances.

[31] Looking at it through the broad lens of justice, special circumstances become often easy to recognise, though remaining difficult to define or describe with precision (perhaps for the better). There are a variety of situations which a reasonable and objective observer will quickly recognise as 'special circumstances'; and others at the opposite end of the spectrum which are easily identified as falling short of being special circumstances. A judge or adjudicator faced with either of these categories of circumstances will have little difficulty in reaching a decision to either grant or refuse a stay.

[32] Then there will be grey areas where it is harder to say with confidence on

A which side of the line their circumstances fall, and with respect to which reasonable persons may come to different conclusions. In such situations, the exercise of balancing the interests of the respective parties will become much more challenging. I will refer to these situations as ‘borderline cases’.

B *B.3 Merits of an appeal*

C [33] The Federal Court in *Kosma’s* case has advised (at para 19 of the judgment) that merits of an appeal is not a ‘special circumstance’; and as a result it is not a relevant factor to be considered in a stay application. That is certainly the law as it stands; though the Federal Court’s dictum needs to be understood in the context in which it is spoken; which is that *it will not assist an applicant for stay* to argue that his appeal has good or strong merits. Such an argument will be irrelevant in a stay-application. In the first place, one should not be appealing unless there are merits in the appeal. Every appellant is expected to say that his appeal has merits. Such an assertion of merits will be made in every case, and can hardly be called a ‘special’ circumstance.

E [34] But I do not think the Federal Court can be said to have held that the converse is necessarily irrelevant. Every experienced judge or adjudicator would have, in the course of his or her career, encountered cases where it is so apparent that the appeal has no merits at all, and may quite rightly be described as a non-starter. In such a situation, a stay will usually be unjustified. Since a judge or adjudicator hearing a stay-application is required to weigh or balance the competing interests of the parties, it should not be out of place in an appropriate instance for the judge or adjudicator to include in that exercise the consideration of any glaring absence-of-merits in an appeal. This factor is not introduced as a special circumstance that will assist the stay-applicant (something already ruled out by *Kosma’s* case). Quite the opposite, it could be introduced to add weight against the grant of a stay. I find nothing in the judgment in *Kosma’s* case that prohibits the same. I also find support for this view in *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493; where it was held that a stay-applicant should, inter alia, show that he has an arguable appeal (see p 500F–H of the case report).

H [35] In short, merits of an appeal, even if demonstrated, will not assist a stay-applicant in obtaining a stay; but absence of merits in an appeal may be raised by a party opposing stay as weighing against the stay applicant. This factor may make little or no difference in cases where special circumstances either clearly exist or clearly do not exist; but it could play a more significant role in borderline cases.

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B.4 Balance of justice

[36] Unsurprisingly, the concept of ‘balance of convenience’ has been imported into the consideration of the grant or refusal of a stay. In *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493; it was held that an applicant for stay must be able to, inter alia, demonstrate that the ‘balance of convenience’ is in his favour (see p 500F–H of the case report). The court had this to say:

The justice of the case on stay is arrived at by *striking a judicious and equitable balance* between the principle that the successful party in the litigation ought to be allowed to reap the fruits of that litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory (at p 499D). (Emphasis added.)

[37] This balancing exercise may not ipso facto become irrelevant even where a judge or adjudicator finds no special circumstances from the grounds put forward by an applicant for a stay; as the High Court has held in *Tan Tien Seng & Anor v Grobina Resorts Sdn Bhd (No 3)* [2006] 5 MLJ 372 at p 27 [2006] 6 CLJ 654 at p 663, para 28:

Notwithstanding the fact that none of the above grounds could constitute special circumstances, I am mindful of balancing the respective rights of the parties herein and maintaining the integrity of the defendant’s appeal.

[38] Some judges prefer to use the term ‘balance of justice’, instead of ‘balance of convenience’. I subscribe to this preference. As often happens, the task of good decision-making ultimately comes back a full circle to the crucial question of what would be the fairest outcome in a set of given circumstances; or, in legal jargon, what the justice of the case requires. When dealing with a stay application, some of the questions that may properly be asked are:

- (a) how will the grant of a stay affect or cause injustice to the party opposing stay?
- (b) how will the refusal of a stay affect or cause injustice to the applicant for stay? and
- (c) weighing the above countervailing factors against each other, and taking into account all other relevant considerations in the matter, while not knowing at this stage what the eventual fate of the appeal might be; which outcome (between a refusal and a grant or a conditional grant of stay) will result in greater justice, or lesser injustice?

A *B.5 Adoption of similar principles*

[39] A planning permission cannot, of course, be described as a judgment. Nevertheless, a stay of implementation of a planning permission shares some similarities with the stay of execution of a court judgment. In both cases, a stay would prevent a party from immediately reaping the fruit of his success — the former of his success in obtaining a planning permission, and the latter of his success in procuring a court judgment in his favour. Consequently, I am of the view that the legal principles regarding a stay of execution of a judgment should *generally* apply to the stay of implementation of a planning permission; with the result that special circumstances must be established before a stay of implementation of a planning permission will be allowed.

[40] Having said that, however, I hasten to add that their similarities are not total. I am of the view that, in planning cases before the planning appeal board, three further considerations are also pertinent, in appropriate situations; though their relative weight (*vis a vis* the other ‘usual’ factors) will depend on the facts of each case. First, in the decided authorities on a stay of execution of a judgment, the courts are mostly concerned with *in personam* disputes between individual parties (in contract, tort, or otherwise). In planning cases, on the other hand, an element of public interest is ever present (the magnitude of which will of course differ from case to case). Hence, in planning cases, the exercise in the balancing of interests will usually have to include public interest, in addition to the competing interests of the parties themselves.

[41] This additional factor could make a significant difference, in cases where public interest lends sufficient weight to tilt the scale either in favour or against the grant of a stay. For example, where it is demonstrated that a stay will adversely affect public interest, it will be difficult to persuade the board to grant one. On the other hand, if the refusal of a stay might give rise to a situation that could constitute a bad precedent, or that will make it difficult or unduly harsh (if the appeal later succeeds) to require the demolition of what shall have already been constructed, then (other things being equal) the argument for a stay will grow stronger.

[42] Second, a court judgment is the result of a decision made by a judge or other judicial officer, who is trained in judicial decision-making, after a trial or a hearing conducted in accordance with the rules of evidence, procedural rules, and substantive law. The rights conferred by a court judgment are solemn and commanding. I do not think one could place on the same platform, as a court judgment, the status or effect of a decision or planning permission granted by

non-judicial officers or personnel in a city council or town council (or other government departments). Before these officers, the contest between parties with opposing or differing interests has not been put to the same degree of vigorous tests as would happen before this Board, or in a court of law.

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[43] Thus, the grant of a planning permission cannot, in these aspects, be equated with the passing of a court judgment. Consequently, the gravitational pull of the reasoning that 'a person should not be lightly deprived of his right to the immediate enjoyment of his success' is less strong in the case of a planning permission, than in the case of a court judgment.

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[44] I find support for this view, by way of analogy, from the case of *Hong Leong Finance Bhd v Hon Hoi Weng* [1987] 2 MLJ 377, where a distinction was made between a judgment handed down by a judge after a full trial and a judgment given by a registrar after a summary hearing:

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When judgment is entered after a full trial of the issues (or in the case of an appeal, after a full hearing thereof), the general rule is that stay of execution pending appeal (or where it applies, further appeal) will not be granted unless there are special circumstances (at p 379G).

In respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry, and one summarily arrived at by a senior assistant registrar (at p 379B).

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This distinction has been supported in a later case of *Kontiki Trading Pte Ltd v Protama Sdn Bhd & Ors* [1998] MLJU 415.

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[45] If a distinction is made between a judge's judgment and a registrar's decision (a registrar being a judicial officer); *a fortiori* a distinction can be made between a court judgment and the grant of a planning permission. In the latter, the argument premised on the enjoyment of the fruit of litigation (or rather that of a successful procurement of a 'planning application') cannot be as strong and as persuasive as when made in the former.

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[46] Third, a further distinction may be suggested that an appeal from the local planning authority to the Planning Appeal Board is a step within the framework, prescribed in the Act itself, for dealing with an application for a planning permission. If it were not meant to be so, the Legislature could easily have provided that a local planning authority's decision is appealable directly to the High Court, or is subject to judicial review directly by the High Court. The fact that Parliament has provided a statutory route of appeal from the local planning authority to the Appeal Board would mean that this process of appeal

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A is very much a part of the scheme or framework designed by the Act for the consideration of a planning application.

[47] That being the case, it may be premature for a planning applicant to claim that it has acquired a vested right to develop its land as soon as a planning permission is granted by the local planning authority; where the further step in the statutory scheme of things has yet to be completed because an appeal has been lodged from the local planning authority to the Appeal Board. It follows that a planning applicant's argument of its entitlement to an acquired right (by virtue of an approval given by the local planning authority) becomes more controversial and less clear cut. It has, arguably, not yet travelled the full length of the journey laid down by the Act for a planning application to go through. It has not reached the finishing line, so to speak, drawn in the statutory framework itself.

D *B.6 Summary of the applicable law*

[48] From the above analysis, I would summarise the law applicable to the stay of the implementation or execution of a planning permission, as follows:

- E (a) an appeal from the local authority to the Appeal Board does not operate as a stay;
- (b) to grant or refuse a stay is a matter of discretion, which must be exercised judiciously and in accordance with established principles. Principally, a stay can be granted only if there are special circumstances sufficient to tilt the scale of justice in favour of the stay applicant;
- F (c) special circumstances are circumstances that are not ordinary, or not common; and that are usually 'a combination of certain determining factors ... to persuade the court (or the board) that it is a just and appropriate case to grant a stay' (see *Jaya Harta*; op cit). Merits in an appeal are not special circumstances; but absence-of-merit could operate against the stay-applicant;
- G (d) the types of special circumstances are, for good reasons, not closed. Examples of special circumstances include where an appeal would be rendered nugatory if a stay is not granted, where the substratum of an appeal will be destroyed if a stay is refused (see *Kosma*, op cit), where the integrity of an appeal needs to be maintained (see *Tan Tien Seng*), or where serious injury may befall the stay-applicant if a stay is refused (see *Siglin v Choules*). Another variation (or type) of special circumstances, applicable particularly to some planning cases, will be discussed in paras 63–70 below;
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- (e) in considering where the balance of justice lies, competing interests of the parties must be weighed against each other, and (in planning cases) public interest should also be taken into account. Some questions which may be properly asked when undertaking this exercise are set out in para 38 above; and **A**
- (f) there are three additional factors which, where appropriate, may be taken into account when dealing with the stay of implementation of a planning permission. They are peculiar to the circumstances of the grant of a planning permission by a local planning authority; and are usually not present in the case of a stay of execution of a court judgment. They are: (a) the effect on public interest of a grant or refusal of a stay; (b) the fact that the issuance of a planning permission cannot be placed on the same platform as a court judgment granted after a judicial process; and (c) whether or not it is premature at this stage for a planning applicant to claim a vested right to develop, when the 'internal' appeal process created within the scheme under the Act has not been completed. **B**
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[49] It is likely that, in the majority of cases, how the discretion to either grant or refuse a stay ought to be exercised will have become clear after applying the principles similar to those employed in deciding the stay of execution of a court judgment, without having to resort to the three additional factors peculiar to planning cases originating from a local planning authority. However, in borderline cases, they could make a difference, and could assist in arriving at a decision as to what is the fairer order to make. **E**

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C. APPLICATION OF THE LAW TO THE CIRCUMSTANCES OF THIS CASE

[50] Applying what I have discussed to the case at hand, the first question to ask is whether or not there are special circumstances here that are sufficient to tilt the scale of justice in favour of the appellant. **G**

[51] The appellant, naturally, argues that there are special circumstance. The planning applicant, not unexpectedly, contends the opposite. The respondent contributes very little to the debate. After hearing learned counsel, and after considering the facts and information made available to the Board up to that stage, as well as the law as I have analysed in the preceding paragraphs; I am of the view that there are indeed several special circumstances in the situation of this case. I will now proceed to discuss each one in turn, and explain why I say so. **H**

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C.1 Extraordinary features — the respondent's two conflicting decisions

- A [52] What is quite unusual in this case has been briefly narrated in paras 12–14 above. They bear elaboration, in the context of a discussion on ‘special circumstances’:
- B (a) the planning applicant demolished the old building without the necessary planning permission — an act clearly in contravention of planning law, as well as against public interest. It has not been suggested that the demolition was done due to some strange colossal error, or sheer ignorance. It has also not been said that it was done otherwise than intentionally. Such a defiant and outrageous act rarely happens, especially on such a scale of demolishing an *entire building*;
- C (b) the planning applicant was then charged. It pleaded guilty. It were fined RM6,000;
- D (c) from the perspective of sentencing in criminal law, it is not for this board to judge whether the sentence is correct or adequate. What I can say, however, is with regard to its effect on planning matters. In my view, such a fine will have no deterrent effect on anyone who might in similar future circumstances be tempted to contemplate the commission of similarly wrongful acts. It does not help to deter a breach of planning law. The reason is obvious. Anyone who goes ahead, unlawfully, to demolish an entire building will not be doing it for fun. He would have a plan for the land, such as to redevelop the land, or to sell the land to a purchaser who wants to develop it and does not want the building on it to get in his way. If the consequence of an illegal demolition is just a fine of RM6,000 or thereabout, such a ‘set-back’ (if we can call it one) will be so miniscule compared to the financial gains that person will obtain through his wrongful act. *This will, whether intended or not, make a mockery of planning law*;
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- G (d) separately from the charge, the respondent had also issued the rebuild order, and served it on the planning applicant, requiring the latter to reinstate the old building. The required act of restoring the old building is of course quite distinct from the punishment (by a fine) for the act of illegal demolition. The two things are meant for two different purposes.
- H The criminal charge was instituted under s 19(1) of the Act; whereas the rebuild order was issued pursuant to s 27(2)(a);
- I (e) there is no substance in the planning applicant’s argument that the rebuild order was wrongly issued because ‘it seeks to charge the KM Applicant for an offence which the KM Applicant had already pleaded guilty for’ (see para 16 of the affidavit of Teo Tay Kewi dated 29 May 2015). The rebuild order was not a criminal ‘charge’ against the planning applicant in any court. It was issued pursuant to a different provision of the Act; requiring the planning applicant to perform its

statutory obligation to restore what it had wrongfully destroyed. Failure to comply with such an order may attract separate penal consequences, under s 27(9) of the Act. It is quite apart from s 19(1) of the Act;

- (f) the planning applicant has not complied with the rebuild order. It appears that the rebuild order has never been withdrawn, revoked or cancelled. The respondent also does not say that the rebuild order was issued in error, or that it ought to have been revoked. This, as we shall shortly see, paints an awkward picture; and
- (g) subsequently, the planning applicant submitted the planning application. The respondent went ahead to consider, and eventually approve, the same (subject to some conditions which I do not need to go into, for the present discussion). This was done without withdrawing or rescinding the rebuild order.

[53] Prima facie, the above presents a very strange picture indeed. First, the respondent issued a rebuild order, which (I am presently told) is still subsisting, and which the respondent does *not* say was issued in error. Then, the same respondent gave planning permission for the construction of condominiums on the same piece of land. In the absence of some exceptional and logical explanation (and none was given at the hearing), these two acts by the respondent contradict each other. They are mutually exclusive. If the old building is required to be restored, then the planning permission to build condominiums on the land does not make sense.

[54] This kind of contradictory actions on the part of the respondent (as the local planning authority) gives birth to special circumstances, with legal implications. This occurs on two fronts: (a) the *Wednesbury* unreasonableness front; and (b) the 'legitimate expectation' front.

[55] A planning authority that issues two contradicting decisions concerning the same land, and that seeks to preserve or defend both decisions, creates a prima facie untenable position; barring some exceptional reason (and none has been provided to the board so far). The two decisions cannot both be right at the same time. It is very unusual to find a situation where a local planning authority tries to juggle two conflicting decisions with no wish of relinquishing any of them. But that is precisely what happens here. *The circumstances in this case are indeed rare and special.*

[56] An interested party (be it a planning applicant or a neighbouring objector) has, prima facie, a legitimate expectation that the local planning authority would not, without good reason, renege on its earlier decision or action, or reverse its policy. This is succinctly explained by Ramly Ali J (as His Lordship then was) in *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja' Afar*

A *v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128 at p 143A–B:

B There are two forms of legitimate expectation, namely, the applicant is capable of having a legitimate expectation of a right to be heard before a decision is made (procedural legitimate expectation), and the applicant is also capable of having *a legitimate expectation that the first respondent when making his decision, will not renege on his previous assurance or reverse his previous policy (substantive legitimate expectation)*. (Emphasis added.)

C [57] The learned judge in that case was speaking about a planning applicant. But there is no reason why such a legitimate expectation can only be harboured by a planning applicant but not by a neighbouring objector. The same principle therefore would apply to our instant case, to give rise to a legitimate expectation on the part of the appellant here, namely that the respondent would not reverse its rebuild order without very sound reasons.

D [58] Normally, an appellant comes before this board armed only with the right of appeal (if properly exercised) given to him or her by statute, and the right to be adequately heard, conferred by the rules of natural justice. Seldom would an appellant be able to illustrate, at an early stage, the prima facie possession of a legitimate expectation (subject of course to the substantive hearing of the appeal). The appellant in this case finds herself in this rare and special circumstance.

F [59] The sum total of the unusual circumstances laid out above, in my view, are more than sufficient to constitute ‘special circumstances’ of a nature that are capable of persuading me that it is just to grant a stay in this case; more so when they are considered together with other special circumstances which I will continue to explore below.

G [60] But, before that, I must address an argument of the planning applicant. Learned counsel for the planning applicant has strenuously argued that the planning applicant had pleaded guilty to the criminal charge, and had been punished by the imposition of the fine (which it had paid). He says that the matter of the demolition of the Old House is over and done with, and should not be raised again or taken into account in this stay-application, for that would amount to the planning applicant being punished twice for the same offence.

I [61] I am afraid the planning applicant has completely missed the point. No one here, least of all the board, is talking about (or interested in) punishing the planning applicant for its wrongful demolition of the Old House. That is the function of a criminal court. What is being examined here, is whether there are special circumstances in this case; and what factors and matters are present that

may constitute special circumstances. It is an entirely different exercise, having nothing to do with wanting to punish anyone for any offence.

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[62] The demolition of the Old House is merely one part (and for the present purpose not the most important part) of a series of events under examination. The rebuild order has far greater significance, in connection with the question of 'special circumstances'. No one is suggesting that a stay should be granted if it is thought that the planning applicant 'deserves' to be 'punished'. That is furthest from the focus of our exercise, in ascertaining either the presence or the absence of special circumstances. The planning applicant has misfired an argument, at a matter not under consideration at all.

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C.2 A variation of the nugatory factor

[63] The appellant contends that, if a stay is not granted, a successful outcome of his appeal might be rendered nugatory; because she would have already suffered the adverse consequences of the construction works (and one cannot un-ring the bell, so to speak); and because, inter alia, by that time construction works could have proceeded to such an extent that it may become unreasonable, or too late, to undo what has been built.

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[64] The fear of the appellant that she will suffer the inconvenience and other adverse effects of construction, and that if she later succeeds she will not be able to 'un-suffer' the same, has a natural ring of logic about it. However, I doubt that, *by itself*, it could constitute a special circumstance that will tilt the scale of justice in the appellant's favour. Her suffering of the effects of construction will in any case be temporary. If she eventually succeeds, it cannot be said that her victory will be rendered nugatory just because she had to endure some amount of suffering in an interim period.

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But her second fear is a more serious, and complex, one.

[65] In theory, no matter how advanced the stage of construction may be (even if it has reached completion), it is still within the power of the Appeal Board, after the conclusion of the hearing, to set aside the planning permission, and order that what may by then have been built is to be demolished. That would be possible. *But would it necessarily be practical, reasonable, or right?*

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[66] Decisions of the board in planning appeals are not made from an ivory tower, or for a theoretical setting. They are made in, and for, real-life situations. It will be unrealistic and unreasonable, in planning matters, to entirely disregard the hard realities of life. After all, planning issues are about life and the conditions and environment of living. In *Fawcett Properties Ltd v Buckingham County Council* [1960] 3 All ER 503; the House of Lords held

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- A that an authority must 'produce a result which does not offend against common sense' (at p 518B). This has been followed by our Court of Appeal in *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17; where we are reminded that a public decision-maker is 'akin to a trustee' (at p 31A); and that he or she must exercise his or her discretion reasonably, in order to 'produce a result which does not offend against common sense' (at p 31F).

- C [67] Hence, where a developer has expended tens or hundreds of millions of Ringgit in constructing (or in partially constructing) what he is permitted to do by a planning permission (one which is not stayed); it could become unreasonable for the board to ignore the immense loss which the developer would suffer if the 'unstayed' planning permission is later set aside, and everything built is then required to be razed to the ground. Such a decision made many months down the line, which carries drastic consequences, might 'offend against common sense'. Therefore, in appropriate cases, avoiding a situation close to a *fait accompli* in reality (though not necessarily in theory) is a factor that can amount to a special circumstance.

- E [68] In our present case, the absence of a stay will mean that, subject to obtaining the relevant work permits (which are not an issue when a planning permission has been granted), the planning applicant can execute its works as quickly as it wishes. By the time the hearing of this appeal is completed, much building-works could already have been done, and considerable expenses could have been incurred. The board will then be obliged to take them into consideration, when deliberating what the fairest decision might be in those *changed* circumstances. In other words, the planning applicant will be free to alter the status quo that exists at the beginning of this appeal, in a way that might lean in its favour, or that might make it harder for the outcome of the appeal to go against the planning applicant. In this sense, the absence of a stay will have an effect of 'tying the hands of the board' to a certain extent. This renders more persuasive the argument that the current status quo needs to be preserved, so that the level playing-field at the start of this appeal will not be altered, even unintentionally, by the time we come to the end of it.

- H [69] In the case of execution of a court judgment, a usual concern is that an appellant who later succeeds cannot be restored to his status quo. That is the nugatory factor we are familiar with. In a planning case where an objector-appellant appeals against the grant of a planning permission, the concern (in some cases) is that the developer could alter the status quo in a way that will make it difficult for the appeal to succeed. A planning appeal which would have succeeded, had the status quo at the start of the appeal prevailed, may be denied of success because of the changed circumstances (due to the action of the holder of a planning permission that has not been stayed), by the

time the appeal has been heard and comes to be decided. In both types of cases, the underlying reason is the same — namely the need to preserve the status quo in appropriate cases. Though each type of scenario has a different flavour, the same rationale beckons.

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[70] In my view, therefore, the need or desirability of preservation of the status quo, in a case such as the present one, can, for the reasons explained above, be a type of special circumstances. It may be analysed either as a variety of the ‘Nugatory Factor’, or alternatively as another category of special circumstances. The reason why the categories of special circumstances are not closed is so that the concept can be shaped or expanded to meet the requirement of justice in each case; rather than allow justice to be trimmed just because a factual situation does not fit neatly into a rigidly-defined legal construct.

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[71] Sensing the force of the appellant’s argument on this score, the planning applicant presents what it suggests is an answer to the appellant’s fear, and a solution to the situation. The planning applicant says that, should the appellant later succeed in this appeal, it is perfectly willing to undo and demolish everything that shall have been built up to that stage. The planning applicant acknowledges that, if that should happen, it will incur very considerable losses, possibly to the tune of millions (if not tens of millions) of Ringgit, depending on the stage of construction then. But the planning applicant assures the board that it is perfectly willing and able to shoulder such losses. It is a wholly owned subsidiary of a public listed company; and it has the financial muscles to withstand such losses.

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[72] Financial strength notwithstanding, this is a very strange ‘offer’ or suggestion to make, from the perspectives of commerce and common sense. A businessman, even one with huge financial resources, will not simply risk millions or tens of millions of Ringgit, just to ‘bet’ on a favourable outcome of a litigation the result of which is uncertain and is not known to anyone, nor to the board itself, at this stage. Commercial sense will say that it is better to wait until the outcome is known; unless the party taking the risk has additional information which is not shared with others (which I have no reason to believe is the case here). The planning applicant’s suggestion defies common sense. It is not a kind of business risk which is common or normal in commercial undertakings.

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[73] But the fact remains that the planning applicant does insist that it wants to take the risk, and to give the assurance. Could it be argued that this is a subjective decision for the planning applicant alone to make; and that it is irrelevant whether or not the board agrees with the decision, or finds it strange or against common sense?

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- A [74] I do not think so. Agreeing to do or to accept something that defies common sense does not change its nature. It will not all of a sudden turn the thing 'common sensible' (to coin a term). In our context, it only means that the planning applicant has agreed to something that is against common sense, and so it should not be heard to complain later if the risk it wants to take works out badly.
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- C [75] But that is looking at things from the standpoint of the planning applicant only. The view from the board's perspective is different. Just because an invitation is extended by the planning applicant to the board to accept a situation in conflict with common sense, and just because the planning applicant promises not to complain if it turns out unfavourably, does not mean that the board must necessarily go along with that invitation, and join hands with the planning applicant to sanction the same. The board must apply its own mind as to whether it is just and proper to do so in the circumstances, having regard to the interest of other affected parties, as well as public interest.
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- E [76] Having so applied my mind, I find that it is not appropriate to go along with the planning applicant's suggestion in this instance; because it does not address the need to preserve the integrity and the substratum of the appeal, or to make sure that the level-playing field in this appeal remains level and unaltered up to the delivery of decision. *These objectives can be achieved only if the status quo is maintained.* In addition, allowing the planning applicant to proceed with works, and by doing so alter the status quo, is also likely to create third parties' interest, which is another special circumstance to which I shall now turn.
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C.3 Creation of third party interests

- G [77] If a stay is refused in this case, the planning applicant will naturally be entitled to proceed with construction, and with its development. It will, subject to obtaining an advertising permit (which falls outside the control of the respondent), be entitled to sell the units of condominium it intends to build, to interested purchasers; and to collect payments from them in accordance with their contracts. The planning applicant has not indicated that they would not be doing so.
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- I [78] Sale of the condominiums by the planning applicant will create as many third parties' interests as there are purchasers. If the appellant should later succeed in her appeal, these purchasers' interests will all be adversely affected. Legal complications will arise. *This likelihood is not something the board can ignore.* Should this possibility later turn into reality, a purchaser may, in addition to feeling misled by the developer, have reason to think that the board has failed in its duty to adequately consider the issue of the creation of

third-party interests, and its effect on public interest, when it refused an application to stay the implementation of the planning permission. This, in my view, is another set of special circumstances that exist in the present context.

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[79] The ripples might not stop at the purchasers. If some purchasers seek loans from banks and financial institutions in making their purchase, and if construction has reached a stage when the bank loans (or parts thereof) have been disbursed, the interests of the banks and financial institutions will be involved. The situation will become even more complex.

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C.4 Other special circumstances

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[80] Each of the three sets of special circumstances explained under Parts C.1 to C.3 above (paras 52–79) is, in my view, by itself already sufficient to tilt the balance of justice in favour of the grant of a stay. A strong element of public interest permeates all of them.

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[81] If I have given each or any of them larger importance than is deserved, then a conference of all the three sets of special circumstances will undoubtedly constitute a potent dose of overwhelming reasons for allowing this stay application. A combination of all three of them is more than sufficient to enable a fair disposal of the application. This is a clear case deserving of the grant of a stay.

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[82] For the sake of completeness, however, I shall further state below, briefly, some other special circumstances which have been identified in this case (even though these are helpful but not crucial to my arriving at the decision to allow the appellant's stay-application):

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- (a) a big question mark hangs over whether the planning applicant has, for many years, acted with good faith. The planning applicant stresses a lot on the fact that it had already been fined for the offence of wrongful demolition. But it offers no good explanation as to why, for a long period of time, it has completely ignored the rebuild order. It neither complied with the rebuild order, nor appealed to the respondent to have it revoked. It is difficult to construe good faith from such conduct;
- (b) it is arguably premature for the planning applicant to claim that it has acquired a vested right to implement or execute the planning permission; seeing that an appeal to the Appeal Board (which is a statutory procedure structured within the framework under the Act itself) has yet to be pursued to its conclusion; and
- (c) the development-history of the subject land makes the circumstances surrounding the grant of the planning permission extraordinary. According to the appellant (and this has not been disputed by the

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- A planning applicant), the previous owner of the subject land had made an earlier application to redevelop the land, but had been refused by the respondent. The fact that the history of development of a piece of land is a legitimate and relevant factor to be considered is not in doubt — see
- B *South Bucks District Council v Porter and another* [2003] UKHL 26; and *R (on the application of Chisnell) and another v London Borough of Richmond Upon Thames and another* [2005] EWHC 134.

C.5 Appeal not devoid of merits

- C [83] It is necessary for a stay applicant to demonstrate that his appeal is not hopeless, ie that he has an arguable appeal. This is done not because the strength of an appeal can assist an appellant to better argue for a stay (for it cannot); but because a total lack of merits in an appeal can be fatal to a stay
- D application.

[84] In our present case, the appellant has shown that there are at least the following prima facie arguable issues in her appeal (the fate of which must of course await the full hearing of the appeal):

- E (a) whether the respondent had acted illogically and irrationally in issuing or maintaining two conflicting decisions;
- F (b) whether the respondent had failed to take into account matters (such as the development-history of the subject land) that it ought to have considered;
- G (c) whether there is a legitimate expectation on the part of the appellant that the respondent would not reverse its previous policy or decision without strong reasons; and if so, whether this legitimate expectation has been displaced or violated; and
- H (d) whether the respondent had erred in applying the increased density guidelines to the facts of this case. In particular, the appellant argues that the respondent had misconstrued a provision in the increased density guidelines, which specifically excludes the application of the said guidelines in a situation where the development site is within 20 metres from an established housing estate ('dalam lingkungan 20 meter zon Perumahan Tetap Sedia Ada'). Whether the calculation of the distance of 20 metres should be measured from the boundary of the development site or from the edge of the proposed building line is another serious
- I issue to be tried.

[85] Identifying some issues, as I have done, does not preclude any party from arguing other issues at the hearing of the appeal. All these issues of course cannot, and indeed must not, be finally decided here and now. They must await

the full hearing of the appeal. Their only relevance at this stage is for the stay-applicant to show that her appeal is not one that is doomed to failure. Once that is shown, the presence of several special circumstances must then be taken on board, and weighed against the interest of the planning applicant. Public interest should also be taken into account in this exercise, as this appeal pertains to planning law.

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C.6 What does justice in this case require?

[86] At the end of the day, the objective of a careful analysis of the facts and the law must be to ascertain what the justice in a particular case requires. It often, as here, involves balancing the competing interests of the respective parties. Sometimes, also as here, it further comprises giving appropriate weight to public interest.

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[87] I have examined how a refusal of a stay will adversely affect the appellant, and public interest. As can be seen from the earlier discussions, there are several strong factors in the present case that tend to incline the scale of justice heavily in favour of the granting of a stay. However, it remains important to examine the interest of the planning applicant, and see how a stay, if granted, would affect it; and then to determine how justice can be best served in the given circumstances.

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[88] The appellant has argued that a stay will not adversely affect the planning applicant in this case, because the latter had purchased the subject land using cash or its own resources (as opposed to using a loan from a financial institution). She says that the planning applicant 'would suffer no (economic) prejudice', if a stay is granted. That is a totally misplaced argument. In the business world, when a person utilises his own financial resources to purchase a piece of land, there will always be 'holding costs'. A stay, if granted, will delay the planning applicant's development plan, and thereby increase its holding costs.

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[89] Hence, if it is thought to be just to allow a stay in this case, the same consideration of justice would require that the adverse effect of a stay on the planning applicant should be reduced as far as reasonably possible. I think this can be done by a combination of two things: to grant only a 'partial stay', by permitting the planning applicant to perform certain preliminary works; and at the same time order that the hearing of this appeal be expedited as far as the board's schedule allows. The latter, of course, can only be accomplished with full cooperation from the planning applicant, and from the parties. It needs no reminder that a stay is merely an interlocutory order with temporary effect; and

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A the final outcome of the appeal awaits further hearing. If allowed to proceed expeditiously, it will best serve the interests of all parties, as well as public interest.

D. UNDERTAKING IN DAMAGES

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[90] The planning applicant has further argued that, if a stay should be granted to the appellant, then the appellant ought to be required to first give an undertaking to the board that she will pay such damages as the board may order, if the board should later find that a stay ought not to have been granted.

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The planning applicant says that this is because a stay-application is 'akin to an injunction' (see para 3 of its written submissions); and that 'an undertaking as to damages is a prerequisite' (see para 6 of the same submissions). For this proposition, the planning applicant cites four cases regarding interlocutory injunctions (three of which involve Mareva injunctions).

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[91] On the other hand, the appellant claims that the board does not have the power to require such an undertaking from her, as the board has no power to order damages to be paid by anyone.

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[92] I find myself in disagreement with the submissions of both the appellant and the planning applicant.

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Firstly, while sometimes the effect of a stay may appear similar to that of an interim injunction, they are in fact two different things. In *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 at 723A–B; our Court of Appeal dealt with the difference between a stay and an injunction. It referred to the following passage from *Regina v Secretary of State for Education and Science, ex parte Avon County Council* [1991] 1 QB 558 at pp 561–562 (also reported in [1991] 1 All ER 282 at p 285h):

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... this question comes back to the issue whether the phrase 'a stay of the proceedings' is apt to include decisions made by the Secretary of State, and the process by which he reached such decisions. If I am correct in my view that the phrase is wide enough to embrace such decisions, it follows that *what is sought is just as much a stay as it would be in relation to a decision or judgment of an inferior court. It is not properly described as an injunction, which is an order directed at a party to litigation, not to the court or decision-making body.* ... (Emphasis added.)

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[93] Secondly, while the imposition of an undertaking in damages may be common in certain types of injunction cases, it is a rule of flexible application, and not an immutable prerequisite.

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Seema Development Sdn Bhd v Mah Kim Chye [1997] MLJU 235; [1998] 1 CLJ 174 concerns two applications for a post judgment Mareva injunction. The facts in that case are different from ours. But the following dicta at p 12

(MLJ); 181d–f (CLJ) are of interest to our present discourse. The court there explains that the requirement of an undertaking in damages is flexible in nature, and that it can be dispensed with where the situation is somewhat different from the typical one involving a Mareva injunction:

On the question of the requirement of an undertaking in damages, ... the circumstances in this case were different from an application for an interlocutory injunction, ... As such, the ordinary requirement of an undertaking in damages given in interlocutory injunction applications may, in my view, be dispensed with here. Although the giving of an undertaking in damages is normally required of a plaintiff applying for a Mareva injunction ... it remains flexible in application.

[94] Thirdly, even in the context of injunctions (let alone a ‘stay’), an undertaking in damages will be required only if it is fair to do so. That this is so is supported by a case cited by the planning applicant itself, namely *Splended Wave Sdn Bhd v Song Hwa Sub* [2015] 8 MLJ 612 (at p 623G), where reference is made to the following passage by Lord Denning in the case of *Allen and others v Jambo Holdings Ltd and others* [1980] 2 All ER 502 at p 505 (also cited by the planning applicant):

It is said whenever a Mareva injunction is granted, the plaintiff has to give the cross-undertaking in damages ... I do not see why a poor plaintiff should be denied a *Mareva* injunction just because he is poor, whereas the rich plaintiff would get it. One has to look at these matters broadly. As a matter of convenience, balancing one side against the other, it seems to me that an injunction should go to restrain the removal of this aircraft.

[95] Fourthly, we are dealing with an inter partes application for stay here. There are authorities to suggest that, again in the context of injunctions (let alone a ‘stay’), an undertaking in damages only applies to the case of an ex parte application for an injunction; and not in an inter-partes application. In *Eshwara Engineering Sdn Bhd v Delta Structure Sdn Bhd* [2003] 4 MLJ 18 at p 28G, it is held that ‘an undertaking as to damages would only apply in an ex parte application for an interim injunction, and there is no such requirement for the same in an inter partes application’. That case followed an earlier decision in *Petronas Dagangan Sdn Bhd v Omar bin Abdul Samad* [1996] 4 MLJ 391 at p 402.

[96] Fifthly, we must not lose sight of the important fact that the authorities cited by the planning applicant on the requirement of an undertaking in damages are all authorities on injunctions. Stay of execution/implementation, and stay of proceedings, are a different kettle of fish. Cases on ‘stay’ (including *Kosma’s* case) make no reference to any need for an undertaking in damages. It is not a requirement in a stay application.

A [97] In cases on stay of execution, different language is used. They do not require the imposition of any undertaking in damages. However, the cases do say that a stay may be granted on condition, or on such terms as may be just. Rule 17 of the Appeal Board Rules 1989 stipulates to a similar effect:

B The filing of a notice of appeal shall not operate as a stay of execution, but the Chairman may on application and on sufficient cause being shown, grant stay of execution on such terms as he may think fit.

C [98] This is why I also depart from the submissions of the appellant that the board can under no circumstances call for an undertaking in damages from a stay-applicant. The wording of r 17 is certainly wide enough to include the imposition of such a condition, in a case where the board thinks is fair and just to do so. So is the wording of s 36(10)(g) of the Act. However, the present case is not one such occasion. For the reasons I have explained, I do not think it is

D right, fair, or appropriate in this case to require the appellant to give an undertaking in damages.

E. DECISION

E [99] My decision is as follows:

- F** (a) that the implementation and execution of the planning permission issued on or about 11 November 2014 by the respondent to the planning applicant be stayed until the final disposal of this appeal before this board, or until further order; except that the planning applicant shall be at liberty to apply for an Earthworks Permit and, if granted, to carry out earthworks at the subject land (but not excavation works, piling works or any other physical works, at the site);
- G** (b) that the respondent be directed to give effect to this order of stay;
- (c) that all parties shall be at liberty to apply to this board, in the event of any dispute regarding the interpretation, ambit or implementation of this order of stay; and
- H** (d) that the hearing of this appeal be expedited; and that it be set down for hearing on 23 July 2015 and 24 July 2015; and thereafter at the earliest available dates.
- (e) Each party shall bear its own costs of this application.

I [100] A draft of these grounds of decision has been circulated to the learned members of the panel, who have conveyed to me their concurrence with the same.

Stay granted pending final disposal of the appeal before the Board with each party bearing its own costs of this application. **A**

Reported by Kohila Nesan

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